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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-5084

ROBERT S. STRAUSS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Justices of the Supreme Court of the United States:

Petitioner, Robert S. Strauss, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the decision of the United States District Court for the Southern District of Illinois, Southern Division, finding defendant guilty of violating 18 U.S.C. §§ 1341 and 1342.

This cause arose out of an eleven-count criminal indictment against Petitioner and one Thaddeus Ohrynowicz, charging that they had entered into a check kiting scheme which constituted mail fraud in violation of Title 18 United States Code, Sections 1341 and 1342. The case was tried before a jury, which returned a verdict of guilty. Judgment was entered on the verdict and defendant sentenced to a total of eight years' imprisonment. The judgment was affirmed by the Court of Appeals.

OPINION BELOW.

The opinion of the Court of Appeals is as yet unreported, and is reproduced in the Appendix to this Petition. The District Court for the Southern District of Illinois, Southern Division, did not file a written opinion.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 15, 1971. A petition for rehearing was filed on September 29, 1971, and denied on October 14, 1971. The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED.

1. Whether defendant was denied his right to a speedy trial under the Sixth Amendment to the United States Constitution.

2. Whether a use of the United States Mails, by a third person, on his own initiative and without the knowledge or approval of the defendant, to clear a check deposited in a bank, and drawn upon an account, may constitute a mail fraud, when it was not in the ordinary or usual course of business for the mails to be used for such purpose, and could not have been anticipated by defendant.

STATEMENT OF THE CASE.

Robert S. Strauss and Thaddeus Ohrynowicz were named in an indictment charging violation of Title 18, United States Code, Sections 1341 and 1342. Defendant Robert S. Strauss was tried alone on this indictment and found guilty by a jury. Judgment was entered upon the jury's verdict.

The indictment consisted of eleven counts. It alleged that from on or about September 1, 1967, to approximately September 15, 1967, Robert Strauss and Thaddeus Ohrynowicz had devised a scheme to defraud or obtain money by false pretenses, namely, a check manipulation procedure commonly known as a "check-kiting scheme". It was alleged in the indictment that defendants had opened a number of checking accounts in certain named banks in Bloomington, Decatur, Normal and Springfield, Illinois, and that the defendants "would and did write, or cause to be written, checks drawn on one of the accounts previously opened at one of the banks listed. . . . in excess of the amount on deposit, payable to one of the other account names in one of the other banks". It was not alleged that either of the defendants had in fact written or attempted to negotiate any check wherein the account upon which it was drawn did not have sufficient funds for the payment of such check. In Counts I and III of the indictment, it was alleged that in furtherance of this scheme, defendants had caused letters containing check orders to be sent via the mails. In Counts II and IV, it was alleged that the defendants caused advice letters transmitting checks to be sent from one bank to another

bank. In subsequent counts, it was alleged that for the purpose of promoting and carrying on by means of the postal establishment of the United States this scheme, defendant Strauss used various assumed names and trade styles. In Count XI of the indictment, it was alleged that the defendants had conspired to devise and carry out the scheme previously alleged.

The indictment in this cause was handed down on or about September 19, 1968. (A. 1) No further action was taken on this cause until on or about September 10, 1969, when the United States' Attorney applied for a writ of habeas corpus *ad prosequendam*, stating that defendant was in the custody of the Warden of the United States Penitentiary at Terre Haute, Indiana, requesting that he be produced for arraignment and subsequent trial. (A. 9) *While the warrant for defendant's arrest had been received by the United States Marshal on September 23, 1968, it was not served upon defendant until October 6, 1969.* (A. 10)

On February 12, 1970, defendant filed a motion to dismiss the cause on the ground that he had been denied a speedy trial, in that the acts alleged in the indictment had occurred in September of 1967, but that the indictment had not been handed down until September of 1968, despite the fact that *all of the acts alleged therein were known to the United States' Attorney no later than October 3, 1967*, at which time defendant had been placed in the custody of the United States Probation Officer for the Southern District of Illinois, and his probation on a previous federal sentence had been revoked. (A. 16-17) The cause was set for trial by the Court on May 4, 1970, at which time a hearing was held on this motion. Up to

that time, the prosecution had made no response to said motion.

When the cause came on for trial on May 5, 1970, defendant's motion to dismiss was argued before the Court and denied.

Several witnesses testified that both the defendant Robert Strauss and Thaddeus Olirynowicz had opened checking accounts in the banks in which they were employed, that they had subsequently deposited checks drawn upon other of these accounts, some of which were cashed for sums in excess of the initial deposit of $500.00. None of the witnesses testified that the bank for which they worked had lost any funds.

Harriet Oxley testified that she was employed by the Millikin Bank in Decatur, Illinois. She testified that the defendant Robert Strauss deposited in the bank in which she worked a check (Government's Exhibit 36) in the amount of $1,065.00. He had not withdrawn any funds on that check. (R. 226-227) Attached to that check is a notation which is termed an advice letter. Such a letter is attached to a check so that the check will be sent to the bank upon which it is drawn directly and get there much quicker. Most checks are not sent through with advice letters, and to do so is something out of the normal range of business activities. (R. 228) The person who deposited this check, the defendant Robert Strauss, did not ask that this check be sent through with an advice letter. This decision was made by Mr. Brahier, an official of the bank. (R. 229) Mr. Brahier himself, who was the supervisor of tellers at the Millikin National Bank, testified that after this person had requested them to give him more cash than he had in the account, they became a

little suspicious and sent the check over on what they call a special cash letter, instead of sending it through normal banking channels. It was mailed by him directly to the Illinois National Bank for collection. (R. 236) Mr. Brahier testified that had the check been sent for collection through the normal channels, it would have been sent to a Springfield bank along with all the other checks drawn on Springfield, and have been dispersed from there. He did not know whether this is normally done by special messenger or by mail. He further testified that customers of the bank have no control whatsoever over the way in which the checks will be sent through for collection, unless they specifically request it. If no specific request is made, it goes through normal banking channels. He testified that the defendant had not made any special request as to the way in which this check was to be collected. The decision to send this check through the mail with an advice letter was Mr. Brahier's decision alone. (R. 240) Such a procedure of sending it through the mails would speed up the transaction, and they would determine sooner than normal whether the check was any good or not. (R. 240-241) Mr. Brahier's position with the bank gave him the discretion as to when it would be sent through the mails and when it would be sent through normal channels. (R. 247).

Mr. Ronald Hovermale testified that he was the assistant cashier at the Springfield Marine Bank. He testified that Government's Exhibit 57 had been deposited in the bank and that at that transaction, $900.00 had been returned to the depositor. (R. 290-291) He stated that since he determined that this cash had been advanced on uncollected funds, he took the check and mailed it di-

rectly to the First National Bank in Normal, upon which it had been drawn, asking them to pay it or return it, marking the reason for returning it. (R. 291) Mr. Hovermale further testified that the check was later returned to his bank marked insufficient funds; however, he further testified that the money which had been advanced to the depositor was returned to the bank on the very same day. At the time they sent the check through the mail for collection, they assumed they knew what the answer would be from the bank upon which it was drawn. (R. 295) However, at the time they sent this check through for collection, they did not know that there was anything at all wrong with the transaction. (A. 296) Sending the check through the mail as he did would speed up the collection process considerably. (R. 298) The decision to send this check through the mail was made by Mr. Hovermale and another officer of the bank. The person who deposited it did not request that it be sent by an advice letter and, under normal procedures, it would not have been. (R. 299)

Mr. Thomas Stephens testified that when checks are normally sent through the clearing house, they are not sent through the mails. (R. 320)

The arresting officer testified that the charges which had been placed against defendant by the State of Illinois had been dismissed. (R. 372)

Defendant's motion for acquittal at the close of the Government's case was denied. (R. 433-34) Defendant argued that the evidence had shown that the use of the mails was not part of the scheme alleged in the indictment, and that any use of the mails which may have occurred was used to stop the scheme. In reply to that, the

Court stated: "Anything done to stop the scheme is part of the scheme." (R. 439) The Court refused to allow defendant to introduce into evidence a certified copy of the court proceedings in the Circuit Court of Sangamon County, showing that the charges, upon which defendant had been arrested and which grew out of the same facts giving rise to this cause, had been dismissed. (R. 446-7)

The jury returned a verdict of guilty, upon which judgment was entered. Defendant's motion for acquittal and in the alternative, for a new trial, was denied by the Court.

The Court of Appeals held that the independent action of two bank officials in sending two checks through the mail for collection could reasonably have been anticipated by defendant, even though "it was not the normal practice of these banks to utilize the mails in the bank collection process."

Even though the applicable statute requires that the mailing "be for the purpose of executing" the scheme, the Court held that this mailing contributed to a time lag, which was intended to aid in avoiding detection, despite the testimony of government witnesses that the only reason the mails were used was to shorten the time lag in clearing the checks.

REASONS FOR GRANTING THE WRIT.

I.

THE DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

The acts alleged in this indictment occurred in September, 1967. Defendant was immediately arrested thereon and charged with violations of the laws of the State of Illinois. These charges, however, were dismissed and defendant was not brought to trial on them. Immediately upon the placing of these charges, defendant was taken into the custody of the United States Marshal, and his parole revoked. He was returned to the United States Penitentiary at Terre Haute, Indiana, where he remained until shortly after the arraignment in this proceeding on September 26, 1969.

The indictment in this cause was not filed until September 19, 1968, more than a year after the alleged acts set forth herein. While the warrant for defendant's arrest was immediately issued by the Clerk of the Court, it was not served upon defendant until it became evident that his previous jail term was about to expire, more than a year after the filing of the indictment. There can be no question that the prosecuting authorities knew where defendant was, as he was in the custody of the Attorney General, as a result of a revocation of his parole, based upon the very acts alleged in the indictment. At no time did the prosecution attempt to justify this long delay in bringing the indictment, and a subsequent delay in serving the charges upon defendant. And both the trial

and Appellate Courts refused to follow the law in this area, ruling that it was up to the defendant to prove that he had been prejudiced by this delay.

Rule 48(b), Federal Rules of Criminal Procedure, states:

> "If there is unnecessary delay in presenting the charge to a grand jury, or in filing of information against the defendant who has been held to answer to the District Court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

Both of the kinds of delay militated against by this rule are present in this case: delay in presenting the charge to the grand jury; and unnecessary delay in bringing defendant to trial. Nor does the record indicate any reason whatsoever for this delay; rather, from all that appears on the record, the delay has been for the express purpose of denying defendant his rights under the Sixth Amendment of the United States Constitution, and penalizing him because he had been serving a jail sentence for the conviction of a prior crime. This is particularly so since his parole on his sentence for the prior crime was revoked as a result of the very acts alleged in this indictment. Clearly, the Government has tried to punish defendant twice for the same acts. More than two years passed between the alleged events and the arraignment of defendant for these charges. More than another one-half year passed before the case was actually brought to trial. At no time did defendant ever request any delay in this cause.

This Court said in *Klopfer* v. *North Carolina*, 386 U.S. 213, 226, 87 S. Ct. 988, 995 (1967):

> "The history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution."

Delay in indictment has been recognized as particularly prejudicial, in fact, possibly more prejudicial than delay after indictment. This was set forth clearly in *Nickens* v. *United States*, 323 F. 2. 808 (D.C. Cir. 1963), *cert. denied*, 379 U.S. 905 (1964), where it was said:

> "Indeed, a suspect may be at a special disadvantage when complaint or indictment, or arrest, is purposefully delayed. With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings of the day of the alleged crime. Memory grows dim with the passage of time. Witnesses disappear. With each day, the accused becomes less able to make out his defense. If, during the delay, the Government's case is already in its hands, the balance of advantage shifts more in favor of the Government the more the Government lags."

No reason was advanced why this indictment was not brought down until more than a year after the alleged acts occurred. Defendant was in the custody of the United States Marshal on October 3, 1967, yet no action was taken until a year later. All of the facts were known to the United States Attorney at the time defendant was originally arrested, yet he failed to take any action to have the cause brought before the grand jury. Thus, the state proceedings having been dismissed, defendant was allowed to think that all action against him had been ended. Suddenly, two years later, he was informed that a federal indictment has been brought down. During this entire time, he had no reason to believe that any further action would be taken, and he was lulled into a sense

of false security. He did not think about the case, or what had occurred on the days in question, or who his witnesses might be. Suddenly incarcerated, with no way in which to begin to prepare his defense, he was informed that he would be forced to face new charges.

The facts here are similar to those found in *Sheftic* v. *Boles*, 4 Criminal Law Reporter 2485 (N.D. W.Va. February 13, 1969). There, the defendant was convicted of breaking and entering. More than a year later, a recidivist information was filed against him, alleging three prior felony convictions. In ordering the defendant's release, the court said:

> "If the warden has information of prior convictions touching one in his custody, the duty exists that he promptly bring such before the appropriate court . . . In Sheftic's case no reasons were offered for the failure to file the information for more than a year after he was placed in the warden's custody. All of Sheftic's prior convictions occurred in the State of West Virginia and involved incarceration in the West Virginia State Penitentiary. As such, it would appear that they were in the immediate knowledge of the warden of the penitentiary. It was an abuse of this Petitioner's equal protection and due process rights to delay the filing of an information for the period of time involved in this case."

So too here, the information was in the hands of the United States Attorney, yet he took no steps to present it to the grand jury. What possible reason could there be for such failure other than to prejudice defendant? This delay, in and of itself, required the prosecution to explain that this delay was reasonable. Yet, no explanation whatsoever was advanced. See *Ross* v. *United States*, 349 F. 2d 210 (D.C. Cir. 1965). This approach was taken by

this court in *United States* v. *Lee*, 413 F. 2d 910 (1969). In that case, there was a lapse of eighteen months between defendant's arrest and indictment. The Court held that such a delay would "normally be enough to put the government to the burden of showing that the delay was reasonable. The longer the delay, the less burden on defendant in proof of prejudice." The Court then stated, however, that defendant showed by her own testimony at the trial that she had no difficulty whatsoever in reconstructing the events of the date in question, contrary to her assertion in her motion. It then stated that "were it not for the refutation at trial, we would be hard put not to reverse under our supervisory power, if not on constitutional grounds." *Id.* at 913. The government, having failed to show that the delay was reasonable, this cause must be reversed outright.

There was not only pre-indictment delay. After the indictment was finally returned, no attempt was made to bring the defendant to trial, even though he was in federal custody. This is further evidence of intentional denial of defendant's rights. The inherent prejudice, where, as here, the defendant is already serving another sentence was recognized by this Court in *Smith* v. *Hooey*, 393 U.S. 374, 89 S. Ct. 575 (1969), where it was said:

> "At first blush it might appear that a man already in prison under a lawful sentence is hardly in a position to suffer from 'undue and oppressive incarceration prior to trial.' But the fact is that delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge. First, the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he

is serving may be forever lost if trial of the pending charge is postponed. Secondly, under procedures now widely practiced, the duration of his present imprisonment may be increased, and the conditions under which he must serve his sentence greatly worsened, by the pendency of another criminal charge outstanding against him."

• • •

"Finally, it is self-evident that 'the possibilities that long delay will impair the ability of an accused to defend himself' are markedly increased when the accused is incarcerated in another jurisdiction. Confined in a prison, perhaps far from the place where the offense covered by the outstanding charge allegedly took place, his ability to confer with potential defense witnesses, or even to keep track of their whereabouts, is obviously impaired. And, while 'evidence and witnesses disappear, memories fade, and events lose their perspective,' a man isolated in prison is powerless to exert his own investigative efforts to mitigate these erosive effects of the passage of time." *Id.* at 378.

This is exactly what occurred with this defendant. Not only was he not informed within a reasonable time that he was charged with a crime, but when he was so informed, he was in no position to seek to obtain evidence with which to defend himself. Again, the long delay present here placed upon the government the burden of showing the causes therefor. Having utterly failed to make such a showing, the cause must be reversed and the charges dismissed. The present state of the record gives rise to the inescapable conclusion that the only reason for the delay was to penalize defendant, by requiring him to serve the longest possible sentence on a prior conviction and then, at the last moment, bringing him to trial for this alleged offense.

II.

THE GOVERNMENT FAILED TO PROVE A USE OF THE MAILS BY DEFENDANT IN FURTHERANCE OF THE ALLEGED SCHEME.

The Government proved at the trial that defendant had participated in a chain of events which consisted of opening an account at several banks with $500.00 cash, and subsequently presenting a check for payment drawn upon other of the accounts in excess of the amount which was credited to such account. The evidence is absolutely clear that the use of the mails was not a part of this scheme. No banks suffered any loss by reason of any act by defendant.

The statute involved herein, 18 U.S.C. §1341, states, in pertinent part:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting to do so, places in any post office of authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom any such matter or thing, knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined . . ."

There is no question that defendant neither placed nor received any matter whatsoever from the mails. Therefore, in order to make out the offense herein, the government had the burden of proving, beyond a reasonable doubt, that defendant knowingly caused some matter or thing to be delivered by mail. The evidence shows that

defendant neither caused any matter to be delivered by the mail nor was any mailing whatsoever a part of the scheme alleged in the indictment.

There were only two uses of the mails proved by the Government which were relevant to the charges in the indictment. These consisted of two checks which were sent from one bank to another.

Milton Brahier testified that after defendant had deposited a check in the Millikin National Bank, he had become suspicious and sent the check to the drawee bank, the Illinois National Bank, on a special cash letter. Instead of sending it through normal banking channels, the check was sent directly through the mails to speed up the transaction. Defendant did not request this treatment of the check, and Brahier, in his sole discretion, made the decision to treat the check in this manner. He did not know whether the check would be sent through the mails had it been handled in the normal manner. (R. 236-47)

Ronald Hovermale of the Springfield Marine Bank testified that he noticed that a check deposited by defendant had been cashed on uncollected funds and he mailed the check directly to the First National Bank in Normal, Illinois. This was done to speed up the collection process. Again, the decision to treat the item in this manner was made at the complete discretion of the bank officials, and was not requested by defendant. (R. 290-99)

Thomas Stephens testified that when checks are normally sent through the clearing house, they are not sent through the mails. (R. 320) Each one of these witnesses testified on behalf of the government.

It is a jurisdictional prerequisite that defendants knew or reasonably believed or contemplated that these checks would be sent by mail. As was said in *Huntley* v. *Schilder*, 125 F. 2d 250, 251 (10th Cir. 1942):

> "The fraud charged in the indictment is not within the jurisdiction of the Federal Court unless it is also charged that the petitioner used the United States mails for the purpose of executing such scheme or artifice, or attempting to do so. The use of the mails is a jurisdictional prerequisite to the offense."

It is federal policy that state crimes be prosecuted by the State Courts. Federal jurisdiction is strictly limited by the Constitution, and here by the statute itself. The State of Illinois chose to drop the charge against defendant. The federal prosecutor must not be allowed to belatedly resurrect old charges in a federal guise.

The element of knowledge that the mails will be used is essential:

> "In this case the defendants are correct in asserting that their indictments were required to cover the element of knowledge that their actions would cause a use of the mails, since if the only use of the mails caused by their fraudulent conduct had been unanticipated and incidental, they would not have violated the mail fraud statute. In interpreting Section 1341, courts have established the rule that for a scheme to come within the reach of that provision it must have 'reasonably contemplated' a use of the mails."

Nor can it be said that defendants must have known that the checks they deposited with the banks would move through the mails. The banks they were alleged to have dealt with were not in far-distant cities. They were all within a small radius. Three were in Bloomington,

Illinois, three were in Decatur, Illinois, one in Normal, Illinois, and five were in Springfield, Illinois. It is just as reasonable to assume that checks sent between these banks would have been sent by messenger as by the United States mails. The use of the mails was no integral or necessary part of the alleged scheme. An incidental, unforeseen use of the mails is not sufficient. As was said recently by the United States Supreme Court:

> ". . . these were essentially state crimes and could become federal ones, under the mail fraud statute, only if the mails were used 'for the purpose of executing such scheme.' Hence, the question is whether the uses of the mails that were charged in the indictment, and shown by the evidence properly may be said to have been 'for the purpose of executing such scheme,' in violation of §1341."

Furthermore, the allegations of the indictment show that any use of the mails was made after the scheme was completed, if any scheme there was. In such situation, no crime has been made out. *United States* v. *Dale*, 230 Fed. 750, 751 (N.D. Cal. 1915).

This specific subject was considered in *Dyhre* v. *Hudspeth*, 106 F. 2d 286, 288 (10th Cir. 1939), where the court held:

> "The fraud charged in each of these counts standing alone is not within the jurisdiction of the federal court, but it may be brought within that jurisdiction by charging that defendant used the United States mail 'for the purpose of executing such scheme or artifice or attempting to do so'. That was charged here, but the charge clearly shows that the United States mail could not have been used for the purpose of executing or in attempting to execute the fraudulent scheme, because the mailing did not take place

until after the defendant had induced the parties named to accept his fraudulent check for merchandise. He had thus accomplished all he set out to do in falsely representing that he had money on deposit in the banks."

It is therefore evident that if there was any use of the mails, it was done after the alleged scheme had been completed. No use of the mails by defendants themselves were alleged or proved. No facts were alleged or proved to support the accusations that defendants caused the checks to be sent by mail.

It is clear that none of these checks were caused to be mailed by defendant, and furthermore that such mailing could not have been part of defendant's alleged scheme. "That the use of the mail is the gist or corpus of the crime is so well established as to require no citation of authority, and must, of course, the same as other essential elements, be proven beyond a reasonable doubt." *Mackett* v. *United States*, 90 F. 2d 462, 464 (7th Circuit 1937): "[I]t is not the scheme to defraud which the federal statute condemns but only the use of the mails in its execution. It is that use which constitutes the *corpus delicti* of the offense." *United States* v. *Browne*, 225 F. 2d 751, 757 (7th Cir. 1955); *Munch* v. *United States*, 24 F. 2d 518, 519 (5th Cir. 1928).

The testimony of the two witnesses for the government show beyond any reasonable doubt that the use of the mails proven by the government was not, and could not have been part of the scheme alleged by the government. A check kiting scheme depends upon delay. Such a scheme can only work if the bank to which a check is presented for payment has not yet become aware of

the fact that the check previously deposited in that account is worthless and will not be paid by the drawee bank. Thus, the more delay, the better the possibility of success. The unequivocal testimony of Brahier and Hovermale was that the mailing of the checks was for the sole purpose of speeding up the collection process, thus attempting to thwart the scheme. The use of the mails was not a part of the scheme, but a means of stopping it. The use of the mails here was not and could not have been a part of the execution of the scheme. This is not a situation such as that present in *Moffitt* v. *United States*, 154 F. 2d 402, 406 (10th Cir. 1946), *cert. denied*, 66 S. Ct. 1343, where the collection of the check by the bank in which it was deposited was a necessary element of the success of the scheme. Just the opposite, collection of the item was the one thing which would stop it cold. Nor can defendant be charged with knowledge that the usual method of collecting items such as this was the use of the mails.

Rather, the situation is more akin to the following situation discussed in *Moffitt*, supra.:

> "It cannot, however, be said as a matter of law that it is a well established custom, of which men of ordinary business experience would have knowledge, that banks require, in addition to the ordinary and customary notification, further notification by telegram and further confirmation of the telegram by mail. There is no evidence in the record that this was the usual and ordinary practice followed by the Blackwell Bank in handling collection items, and there is a complete absence of any evidence that appellant was informed of such a custom or that such a procedure would be followed in this instance. He had no reason, therefore, to believe or know when he de-

posited the check for collection that such a telegram would be required, or that if it was required that a further letter also would be mailed confirming the telegram. The telegram and letter confirming it were not ordinary, usual, or customary links in the chain of events which he set in motion by depositing the check for collection. It follows that he did not use or cause the mails to be used by the correspondent bank in sending his letter confirming the telegram. His motion for a directed verdict as to Count 3 should have been sustained."

So here, defendant cannot be held to have reasonably anticipated that the mails would be used when he negotiated the check. There is no evidence that this is the usual practice. Indeed, the witness Brahier, supervisor of tellers at the Millikin National Bank, whose decision it was to forward the check by mail, did not know whether the mails would normally be used. (R. 240) If a person in the industry does not have such knowledge, it cannot be charged to defendant. As a matter of fact, in the normal and usual course of business, the mails would not have been used. (R. 320)

There is yet another basis for finding the evidence against defendant insufficient. It is clear that the use of the mails occurred after the completion of the scheme. When the use of the mails occurs after the completion of the scheme, it is not for the purpose of executing the scheme and is not an offense under the statute. *Bliss* v. *United States*, 354 F. 2d 456 (8th Cir. 1966).

This proposition is most forcefully demonstrated in *Kann* v. *United States*, 323 U.S. 88, 65 S. Ct. 148 (1944). Defendant there was charged with attempting to defraud a corporation of which he was president. That cause too

involved the cashing of checks in one bank which subsequently mailed the check to the drawee bank. The language of the Court holding that the scheme had been completed upon the receipt of the money by the defendant from the bank, and that the subsequent mailing of the check to the drawee bank occurred after the completion of the scheme is dispositive of this case:

> "The remaining contention is that the checks were not mailed in the execution of, or for the purpose of executing, the scheme. The check delivered to the five defendants by the building contractor in payment for timber they claimed to own was cashed by them at a local bank in Elkton, Maryland. By cashing it they received the moneys it was intended they should receive under the scheme. The Elkton bank became the owner of the check. The same is true of the bonus check delivered to defendant Willis and deposited and credited to his account. The banks which cashed or credited the checks, being holders in due course, were entitled to collect from the drawee bank in each case and the drawer had no defense to payment. The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires."

The essence of the alleged scheme was to receive money to which he was not entitled. Once he had received the money, the scheme was completed. What the banks did with the check after he had cashed it was entirely immaterial to him. The collection of the check from the drawee bank was no part of the scheme, and any step

toward that end could under no theory be a part of executing the fraud. As was said in *Parr* v. *United States*, 363 U.S. 370, 389, 80 S. Ct. 1171, 1183 (1960):

> ". . . as its terms and purpose make clear, the federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law."

CONCLUSION

This record clearly shows unconscionable delays in indicting and bringing defendant to trial. They are clearly unreasonable and unexplained by the Government. Defendant was in custody as a result of the charges, which were known to the Government from the very day he was taken into custody; as his federal parole on another charge was revoked as a result of these very same charges. Yet, he was allowed to remain in jail for more than two years before any attempt whatsoever was made to bring him to trial on these charges. Such unconscionable delay cannot be countenanced. It is unreasonable and oppressive.

It is just as clear that no federal crime was involved in this cause. Federal jurisdiction is limited, both by Constitution and statute. The Government strained with all its might to find a federal offense here, but the evidence shows that it was unable to do so. Any scheme which might have been concocted by defendant was, at most,

an offense against the State of Illinois which elected to drop the charges. The mails were not an integral, or even peripheral, part of the scheme alleged in this indictment. Any use of the mails was not for the furtherance of this scheme, but was the result of independent action by third parties, outside the normal and usual course of business, to halt what they thought might be a scheme. Clearly the view of the trial judge, that anything done to stop the scheme was a part of the scheme, upheld by the opinion of the Court of Appeals, was contrary to all reason and justice.

Federal Mail Fraud is a strictly and clearly defined crime. It is a negation of federal policy to twist this statute to cover an alleged crime which it was never meant to cover. The federal judiciary must abide by its own rules and the federal statutes. This Court must vindicate that policy here, as it has done in the past. The Court is not asked to award medals but to protect the accused from judicial abuse.

Respectfully submitted,

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APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

SEPTEMBER TERM, 1970 — APRIL SESSION, 1971

No. 18890
THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ROBERT S. STRAUSS,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

September 15, 1971

Before KILEY and CUMMINGS, *Circuit Judges* and CAMPBELL, *Senior District Judge.**

CAMPBELL, *Senior Judge.* The defendant, Robert S. Strauss, was indicted jointly with one Thaddeus M. Ohrynowicz for participation in a check-kiting scheme involving some twelve banks located in Illinois. Strauss was tried alone before a jury and was found guilty on five counts of mail fraud in violation of 18 U.S.C. §§ 1341, 1342. Judgment of conviction was entered upon the verdict and consecutive sentences[1] totaling eight years were imposed.

Except for the defendant's claim that the government failed to establish beyond a reasonable doubt a use of the

* Senior District Judge Campbell of the Northern District of Illinois is sitting by designation.

[1] On each of the counts charging violations of 18 U.S.C. Sec. 1341 the defendant was sentenced to five years, the sentences to run concurrently. On each of the counts charging violations of 18 U.S.C. Sec. 1342 the defendant was sentenced to three years, the sentences to run concurrently. The five year sentences and the three year sentences were ordered to run consecutively, for a total sentence of eight years.

mails by the defendant in furtherance of the alleged scheme to defraud, the sufficiency of the evidence is not challenged on appeal. Thirty-six witnesses testified and each of them, in varying degrees, implicated the defendant in the check-kiting scheme. The defendant did not testify or otherwise present any evidence on his own behalf. In addition to the question regarding the use of the mails, the defendant also contends that he was denied his constitutional right to a speedy trial and that the district court erred in denying his motion to suppress certain articles seized from the automobile of Thaddeus Olszynowicz and introduced into evidence during the defendant's trial. Another ground for reversal urged by the defendant is the claim that the indictment did not adequately charge an offense under 18 U.S.C. § 1341.

The offenses charged in the indictment were allegedly committed during a period from September 1, 1967 to approximately September 15, 1967. The defendant's arrest by State authorities followed almost immediately as did his return to the custody of the United States Marshal. His parole on a prior federal sentence was revoked and the defendant was returned to the United States penitentiary at Terre Haute, Indiana. The indictment in this cause was not filed until September 19, 1968, slightly more than one year after the commission of the offenses. A detainer was then immediately lodged against the defendant at the place of his incarceration. Approximately another year later the defendant was brought to Springfield, Illinois and arraigned on the charges contained in the indictment. The motion to dismiss, based on Rule 48 (b)[1] and the sixth amendment right to a speedy trial, was not made until about five months after arraignment. The trial commenced some three months later.

Arguing that he was prejudiced by the "unnecessary" one year delay in presenting the charge to the grand jury, the defendant contends that the district court erred in denying his motion to dismiss. He also claims that the

[1] Rule 48 (b), F.R.Crim.Proc., provides: "If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

post indictment delay of approximately one and one-half years deprived him of his right to a speedy trial. In determining whether the constitutional assurance of a speedy trial has been breached, consideration must be given to the length of the delay, the reasons for the delay, the reasonable possibility of prejudice to the accused, and whether the accused can be said to have waived the right. *United States* v. *Perez*, 398 F.2d 660 (7th Cir. 1967). With particular reference to pre-indictment delays, this Circuit has adopted the rule that the trial court should dismiss the indictment only if the accused can demonstrate that he has been prejudiced by the postponement. *United States* v. *Lee*, 413 F.2d 910, 913 (7th Cir. 1969); *United States* v. *Hauff*, 395 F.2d 555, 557 (7th Cir. 1968). Only where some evidence of prejudice has been presented is a burden placed on the government to explain the delay. Here, no prejudice, other than by way of general assertion, is even claimed by the defendant. It is not argued, for example, that the passage of time dimmed the memories of the witnesses or caused the disappearance of any possible witnesses for the defendant. No claim is made that the defendant was embarrassed or hindered in the preparation of his defense. The assertion that the possibility of a concurrent sentence with the defendant's prior sentence was lost as a consequence of the delay must be viewed as conjectural, if not frivolous, in light of the imposition of consecutive sentences in the case.

Although no prejudice has been shown here, the government nevertheless commendably offers an explanation for the delay. Prior to indictment, the government represents that much time was necessary to enable the Post Office Inspectors to investigate the facts and to gather evidence for presentation to the grand jury. Since the alleged scheme involved twelve banks located in four different Illinois towns and since there were numerous potential witnesses, it seems that the investigatory pre-indictment delay is a satisfactory explanation by the government. *United States* v. *Feinberg*, 383 F.2d 60, 64-65 (2nd Cir. 1967). We are not dissuaded from this conclusion by the defendant's gratuitous argument that since his prior federal parole was revoked so shortly after his arrest,

facts sufficient to indict the defendant must also have been then available to the United States Attorney, thus rendering any delay "unnecessary." In this respect, what was said in *United States* v. *Feinberg*, 383 F.2d 60 at 67 (2nd Cir. 1967) is applicable here:

> "It would be unwise to impose on the judiciary the inquisitorial function of scrutinizing the internal operations of law enforcement agencies when no possible prejudice to the accused has been shown."

Concerning the post-indictment delay of approximately a year and one-half, the government submits that the delay is attributable only to its desire to try the defendant with Thaddeus Ohrynowicz who was jointly indicted with him and who was a fugitive during this period. Indeed had the government waited but two months longer, when Ohrynowicz was finally apprehended, the two men could have been tried jointly. Considering the absence of any demonstrated prejudice as well as the intricate involvement of both men in the alleged scheme to defraud and the interest of prosecuting both men at the same time, we believe this explanation to be reasonable. Thus, the district court did not err in refusing to grant the defendant's motion to dismiss the indictment on these grounds.

The defendant next argues that it was error for the district court to deny his motion to suppress certain articles seized from the automobile of Thaddeus Ohrynowicz and later introduced during his trial. The material seized consisted of numerous checks, deposit tickets and receipts in the names of various accounts with Illinois banks, a check protector and a typewriter. It is contended that at the time of Ohrynowicz' arrest and the subsequent search of the vehicle, the police were not armed with sufficient factual information to support a finding of probable cause for arrest without a warrant. No challenge to the scope of the search is made and we therefore must confine our inquiry to the question of whether probable cause was present when the vehicle was searched.

The record discloses that on September 13, 1967, Detective William Ascher of the Springfield Police Department was summoned to the Capitol Bank in Springfield

and there spoke with Thomas Stephens, a bank official. The detective was informed that the Bank had been victimized by a checking account scheme wherein several days previously an individual, later identified as the defendant, came into the Bank and opened a checking account with a $500.00 cash deposit. A day later the defendant returned, deposited a check and withdrew the original deposit. The following day, September 13, 1967, the defendant attempted to deposit another check and with it attached a cash-out (*i.e.*, withdrawal) ticket in the amount of $900.00. Because the check deposited by the defendant on the second day had been dishonored, Mr. Stephens informed the defendant that the Bank could not allow him to withdraw any additional funds from his account. He then hurriedly departed the Bank. Through the assistance of a customer of the Bank who had seen the defendant and another man speed away from the Bank in a car, Mr. Stephens was able to give Detective Ascher a description of the two men and the automobile, as well as the vehicle's license number. This information as well as the nature of the scheme was then communicated to police headquarters and broadcast over their radio system. When Detective Ascher contacted his office he was informed that one of the men he had described had been arrested at the First National Bank of Springfield for his suspected involvement in the same type of scheme to defraud. Ascher was also told by his office that two other Springfield banks had reported the occurrence of similar frauds earlier that morning. A short time lafer the detective was notified that the car in question was seen in downtown Springfield parked and unoccupied in the vicinity of another bank. After proceeding to this area, the detective, in the company of other police officers, observed Thaddeus Ohrynowicz enter the automobile and commence to drive away. The officers then stopped the car, placed the driver under arrest, and searched the vehicle, discovering the materials later introduced at defendant's trial.

We agree with the defendant that the standard for reviewing a police officer's assessment of probable cause prior to a warrantless arrest should be no less stringent

than that employed by a court in reviewing a magistrate's determination prior to the issuance of a warrant. *Whitely* v. *Warden*, 39 U.S.L.W. 4339, 4341 (1971); *Beck* v. *Ohio*; 379 U.S. 89, 96 (1964). We find that the circumstances here justify such a finding of probable cause. The motion to suppress was properly denied.

The sufficiency of the indictment to charge an offense is next challenged in two respects. First, it is contended that the indictment is fatally defective because it fails to name the victims or the intended victims of the alleged offense. A second defect is raised through the contention that a use of the mails by the defendant was not charged in the indictment. Neither contention has merit. With regard to whether the "victims" of the scheme were named, the indictment, following a thorough description of the nature of the check manipulation procedure, sets out the names of twelve banks at which checking accounts were opened. Although the descriptive word "victim" is not used, a reasonable construction of the indictment, considered as a whole, leads to the conclusion the banks named were indeed the intended "victims" of the fraud. The indictment adequately apprised the defendant of the nature of the charge against him and was sufficient to permit the defendant to plead the judgment as a plea in bar to a subsequent prosecution for the same offense. See *Collins* v. *Markley*, 346 F.2d 230 (7th Cir. 1965).

Concerning the claim that a use of the mails was not alleged, we observe that most of the defendant's argument on this point is directed to the government's evidence of mailing, rather than to the sufficiency of the allegations contained in the indictment. The indictment alleges that "for the purpose of executing the aforementioned scheme and artifice to defraud and attempting to do so" the defendant "caused to be mailed" by certain of the named banks "advice letters" (bank collection letters) transmitting checks signed by the defendant under fictitious names and drawn on another of the named banks. Both the drawee banks and the banks transmitting the advice letters were specifically identified. Clearly the use of the mails and the relationship of these mailings to the fraudulent scheme was set forth in the indictment. The

defendant's "causing" the use of the mails was also stated. That this was done "knowingly" by the defendant is adequately charged by the phrase "for the purpose of executing the scheme." *United States* v. *Richman*, 369 F.2d 465, 467 (7th Cir. 1966). The defendant's suggestion that the indictment did not allege that advice letters contained any misrepresentations is without merit since it is not necessary that the false representations were themselves transmitted by mail. *Anderson* v. *United States*, 369 F.2d 11 (8th Cir. 1966), cert. denied 386 U.S. 976; *United States* v. *Hopkins*, 357 F.2d 14 (6th Cir. 1966), cert. denied 385 U.S. 858. We find that the indictment here was proper.

Lastly, defendant argues that the government failed to meet its burden of proving a use of the mails, particularly in that the government's proof did not show that defendant did anything to "cause" the use of the mails and that any mailing which did occur was not an integral part of the scheme to defraud because the alleged mailings took place only after the completion of the scheme. The Supreme Court disposed of this argument in its opinion in *Pereira* v. *United States*, 347 U.S. 1, 8-9 (1953) wherein it stated:

> "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, *or where such use can reasonably be foreseen, even though not actually intended*, then he 'causes' the mails to be used." [Emphasis added] See also *United States* v. *Lowe*, 115 F.2d 596, 598-599 (7th Cir. 1940).

Measuring the defendant's acts by this standard, it can readily be seen that the defendant caused the mails to be used. The defendant together with his accomplice opened checking accounts in twelve banks located in four different cities. Although, it was not the normal practice of these banks to utilize the mails in the bank collection process, the evidence shows the practice of sending advice letters through the mails was not an isolated one and could reasonably have been anticipated under the circumstances. *United States v. Brickey*, 426 F.2d 680 (8th Cir. 1970); *United States* v. *McConaky*, 294 F. Supp. 1 (E.D. Wis. 1969).

Relying on *Parr* v. *United States*, 363 U.S. 370 (1960), *Kann* v. *United States*, 323 U.S. 88 (1944), and *Dyhre* v. *Hudspeth*, 106 F.2d 286 (10th Cir. 1939), the defendant contends that the fraudulent scheme was complete upon presentation and payment of the insufficient funds checks and that therefore the mailings occurred after completion of the scheme and thus there was no violation of the mail fraud statute, 18 U.S.C. § 1341. However, the Supreme Court has also said that neither *Kann* nor *Parr* announced an inflexible rule that the use of the mails after the victims' money had been obtained can never be for the purpose of executing the fraud. *United States* v. *Sampson*, 371 U.S. 75, 80 (1965). Here the use of the mails "caused" by the defendant provided or contributed to a time lag which was intended to aid in avoiding detection. See *United States* v. *Decker*, 411 F.2d 306 (4th Cir. 1969); *United States* v. *Hendrickson*, 394 F.2d 807 (6th Cir. 1968). The mailing, established by the evidence, we find to have been an integral part of the scheme to defraud.

The judgment of the district court is affirmed.